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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C.M. UBERMAN ENTERPRISES, INC. et al.,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court should enforce a purchaser's promise to make periodic payments stretching into the future, on the ground that the promise standing alone is not illegal, without even hearing the defense that the promise is part of an illegal tying arrangement that requires the purchaser to pay an unlawfully high purchase price.

2. Whether an antitrust challenge to an illegal tying arrangement is barred by the statute of limitations, on the ground that the arrangement was entered into and the tied product delivered more than four years earlier, where within the statutory period the seller has enforced the agreement and required the buyer to pay an unlawfully high price.*

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* The parties in the court of appeals were as follows: Appellants were Williamsburg Wax Museum, Inc., National Civil War Wax Museum, Inc., National Souvenir Center, Inc., and Historical Reviews, Inc., who are petitioners herein and were plaintiffs and counterclaim-defendants in the district court; appellees were Historic Figures, Inc., National Historical Museum, Inc., Lynch Display Corporation, and Earl W. Dorfman, who are respondents herein and were defendants and counterclaim-plaintiffs in the district court.

After the filing of this action, petitioner National Souvenir Center, Inc. changed its name to C.M. Uberman Enterprises, Inc. and petitioners Williamsburg Wax Museum, Inc. and National Civil War Wax Museum, Inc. were merged into C.M. Uberman Enterprises, Inc. Historical Reviews, Inc. remains a separate, but commonly owned, corporation.

Respondents Historic Figures, Inc. and National Historical Museum, Inc. are subsidiaries of the Forge Company. Earl Dorfman is Vice President and principal shareholder of Lynch Display Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Souvenir Center, Inc., Historical Reviews, Inc., Williamsburg Wax Museum, Inc., and the National Civil War Wax Museum ("petitioners") respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the court's judgment of February 10, 1984, in *National Souvenir Center, Inc. v. Historic Figures, Inc.*, No. 82-2329 and consolidated cases Nos. 82-2330, 82-2337, 83-1268, 83-1269, and 83-1270.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported; it is unofficially reported at 5 Trade Reg. Rep. (CCH) ¶ 65,850 and appears as Appendix A to this Pe-

tition.[1] The orders of the district court from which appeal was taken, and the district court's Memoranda, one of which is reported at 554 F. Supp. 182, appear as Appendix B. The orders of the court of appeals denying petitioners' petition for rehearing and suggestion for rehearing en banc appear as Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1984. A timely suggestion for rehearing en banc was denied on April 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

This case involves Sections 4, 4B and 16 of the Clayton Act, 15 U.S.C. §§ 15, 15b and 26 (1982), and Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). These statutory provisions are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioners are corporations that operate wax museums in Williamsburg, Virginia; Gatlinburg, Tennessee; and Gettysburg, Pennsylvania.[2] In the 1960's, petitioners entered into agreements to purchase or, in the case of the Gatlinburg museum, lease figures for display in their museums from respondents for specified prices, which petitioners paid in full. In addition, as a condition of their agreeing to furnish the display figures, respondents also required petitioners to enter into long-term franchise agreements that required respondents to provide various "franchise" services, including historical research, plan-

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[1] The Court of Appeals did not issue a separate Judgment. A letter from the Clerk's Office stating that the Judgment was entered on February 14, 1984 is included in Appendix A.

[2] *See* n.*, *supra*. Petitioner Williamsburg Wax Museum operates the museum in Williamsburg; petitioner National Souvenir Center, Inc. operates the museum in Gatlinburg; petitioner Historical Reviews, Inc. was the original franchisee of the Gatlinburg museum; petitioner National Civil War Wax Museum operates the museum in Gettysburg.

ning assistance, and advice regarding promotion, advertising and operating procedures.

For these franchise services, petitioners were required to pay five percent of their gross receipts for twenty years and, in the case of the Williamsburg agreement, two and one-half percent of gross receipts thereafter. The payments for franchise services were due quarterly. Respondents enforced the payment obligations; on those occasions when petitioners' payments were late, respondents demanded either in writing or orally that payment be made.

In 1977, petitioners filed suits against respondents for damages and injunctive relief, alleging that the contracts were illegal tying arrangements in which, as a condition of acquiring the display figures (the tying product), petitioners were required to purchase the franchise services (the tied product). They also alleged that the lease of the figures for the Gatlinburg museum unlawfully perpetuated respondents' monopoly power in the display figures market. Simultaneously with the filing of the complaints, petitioners ceased making either franchise payments or lease payments to respondents. Respondents counterclaimed for the amounts withheld plus interest.

The district court denied respondents' motion for summary judgment on petitioners' antitrust claims on May 19, 1981. After reviewing the evidence, the court found that respondents had contractually bound themselves "to package together" the display figures and the franchise services. App. B at 34a. The court held that there were disputed issues of fact as to each of the elements of the tie-in offense and that, if those issues were resolved favorably to petitioners, the contracts would be illegal. App. B at 36a. The court also rejected respondents' arguments for summary judgment or dismissal of petitioners' monopolization claims. App. B at 35a n.8.

Nevertheless, the district court subsequently granted judgment for respondents without ever deciding the merits of petitioners' claims. On September 3, 1982, not-

withstanding this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), the district court ruled that petitioners could not raise the illegality of the agreements as a defense to respondents' counterclaim seeking to enforce them.[3] And on December 23, 1982, it ruled that petitioners' affirmative antitrust claims were barred by the statute of limitations. App. B at 53a-61a.

On February 10, 1984, a panel of the United States Court of Appeals for the District of Columbia Circuit affirmed for the most part the district court's rulings. The court rejected petitioners' illegality defense with respect to the tying arrangement on the ground that the promises to pay franchise fees "do not appear on their face to be primarily means to enforce the allegedly illegal tie-ins." App. A at 23a. The court rejected petitioners' illegality defense with respect to the lease arrangement on the ground that the obligation to pay rent "standing alone" is not illegal. App. A at 24a. The court concluded that neither enforcing the franchise agreements nor enforcing the lease would constitute enforcement of an illegal restraint on competition. App. A at 23a. In addition, the court held, even if an order enforcing those agreements would constitute judicial enforcement of an illegal restraint, that harm "is far outweighed" by other considerations. App. A at 24a.

As to the statute of limitations issue, the court concluded that no franchise services were required to be provided during the four-year limitations period and that the only conduct that had taken place under the franchise agreements during that period was respondents' collection of franchise fees from petitioners. App. A at 17a. The court held that respondents' collection of the franchise payments did not injure competition and thus did not constitute "antitrust harm." App. A at 17a. Because

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[3] The district court first ruled that the illegality of the arrangement was no defense to the counterclaims on May 19, 1981. It denied plaintiffs' motion for reconsideration in light of this Court's subsequent decision in *Mullins* on September 3, 1982. App. B. at 46a.

there had been no "antitrust harm within the limitations period," the court held, petitioners' claims were time-barred. App. A at 17a.[4]

REASONS FOR GRANTING THE WRIT

Taken together, the court's decisions on the illegality defense and statute of limitations issues mean that respondents will continue to reap the benefits of their allegedly illegal tying arrangement and monopolization, petitioners will be required to continue to pay an allegedly excessive price for the tied product, and the federal courts will lend their aid to the enforcement of the allegedly illegal arrangement—even though the antitrust claims have survived a motion for summary judgment and no court has determined whether the agreements violate federal law. In petitioners' view, this result if left to stand would undermine the policies of the federal antitrust laws and place the federal courts in the untenable position of acting in furtherance of unlawful conduct.

I. THE COURT OF APPEALS' DECISION NARROWS THE ILLEGALITY DEFENSE IN TWO RESPECTS, BOTH OF WHICH CONFLICT WITH DECISIONS OF THIS COURT AND RAISE IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY.

It has always been the law, until this case, that "none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain." *Gibbs v. Consolidated Gas Co.*,

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[4] The court did, however, reverse the district court's grant of summary judgment on petitioners' antitrust challenge to the lease of display figures in the Gatlinburg contract. It reasoned that requiring petitioners to continue paying rent meant they could not replace the figures throughout the duration of the lease. The lease thus had a "continuing anticompetitive effect," and petitioners' claim could not properly be barred by the statute of limitations. App. A at 19a.

130 U.S. 396, 412 (1889) (citation omitted).[5] As this Court put it recently in *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 77 (1982), "our cases leave no doubt that illegal promises will not be enforced."

In this case, however, the court of appeals held that illegal promises should be enforced. The court ruled that petitioners' allegation that the promise to purchase the franchise services was an unlawful tying arrangement did not state a defense to respondents' effort to enforce the promise. The court also rejected petitioners' illegality defense to the Gatlinburg lease. The court distinguished between promises that are "the means to enforce" an illegal scheme, which a court may not enforce (App. A at 23a), and the "fruits" of such a scheme, including promises to pay prices in excess of "the fair value of the goods and services received and consumed." App. A at 23a. The latter, the court held, may be judicially enforced because such promises are not illegal "standing alone" (App. A at 24a) and because entertaining the illegality defense in such cases would require complex proof and would let the buyer escape from its side of the bargain. App. A at 24a.

Both rationales of the decision below are wrong; both were rejected by this Court in *Mullins*; and, if left uncorrected, both would significantly restrict the scope of the illegality defense. The appellate court's decision is likely to have far-reaching precedential significance and to engender confusion in an area of the law that this Court recently sought to clarify. This Court should grant

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[5] *See Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262-63 (1909); *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899) ("no court will lend its assistance in any way towards carrying out the terms of an illegal contract"); *Miller v. Ammon*, 145 U.S. 421, 426 (1892) ("[w]hen a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover").

certiorari to prevent this confusion and the distortion of its prior decisions.[6]

A. The Court Of Appeals' Decision Ignores This Court's Long-Standing Prohibition Against Judicial Enforcement Of Promises That Were Extracted In Violation Of The Antitrust Laws.

Petitioners have alleged, and this Court should assume, that the franchise agreements are part of an illegal tie-in—indeed, that petitioners' coerced promise to purchase franchise services is precisely that aspect of the arrangement that renders it unlawful. Enforcement of the franchise agreements would thus lend the courts' aid to the illegal scheme and permit respondents to reap its forbidden "fruits," including, in particular, the amount by which the contract price for the services exceeds the fair market value of those services.[7] This result is contrary to the "long established" rule

> "that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality . . . ." [8]

The court of appeals has, in effect, carved out an exception to this rule. But in so doing, it misunderstood

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[6] Even if petitioners' affirmative claim of an antitrust violation arising out of the tie-in arrangement were barred by the statute of limitations, as the appellate court concluded, the statute of limitations would not bar the defense of illegality. *See Bull v. United States*, 295 U.S. 247 (1935).

[7] *See, e.g., Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). Damages for an illegal tying arrangement could also include other kinds of economic injury. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1558 (1984) (invalid tying arrangements might force the buyer to purchase a product it did not want at all); *Pogue v. Intern'al Indus., Inc.*, 524 F.2d 342, 345 (6th Cir. 1975) (tie-in may cause business failure).

[8] *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909).

this Court's latest two decisions concerning the illegality defense and the substantive law of tie-ins as well.

In both *Kelly v. Kosuga*, 358 U.S. 516 (1959), and *Mullins*, this Court recognized that the illegality defense must be permitted where its rejection "would be to make the courts a party to the carrying out one of the very restraints forbidden by the [antitrust laws]." 358 U.S. at 520; 455 U.S. at 80. The critical flaw in the appellate court's reasoning in this case is that it misunderstood what constitutes judicial enforcement of an illegal restraint.

The Court in *Kelly* disallowed the illegality defense because the contract at issue was a lawful contract for the sale of goods "at a fair price" and "for a fair consideration." 358 U.S. at 521. Ordering payment of the fair price did not require the court to give its imprimatur to an illegal agreement. The fact that the parties in *Kelly* had also made a separate agreement to withhold goods from market in violation of the antitrust laws did not matter; the court was not asked to enforce that agreement, and its illegality had not affected the price or other terms of the contract provision being enforced.

The Court in *Kelly* distinguished between the agreement at issue in that case and agreements like that at issue in the Court's earlier decision in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), in which the Court upheld the illegality defense in a suit to recover an "excessive purchase price" that was the "fruit" of an antitrust violation. 212 U.S. at 262. The Court in *Continental Wall Paper* concluded

> "that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act."

358 U.S. at 520.

The Court adhered to and clarified these principles in *Mullins*. The Court reaffirmed the principle that, while an illegality defense is inapplicable to an effort to enforce a lawful contract for goods sold at a "fair price," a court will not enforce a contract for goods sold at "an excessive purchase price" extracted in the course of an antitrust violation. 455 U.S. at 80. The Court thus held that the contract at issue there—which called for petitioner to make certain payments for each ton of coal it had previously purchased from non-union employers—could not be enforced.

In reaching this result, the Court in *Mullins* rejected the very arguments on which the court of appeals rested its decision in this case. Just as the court of appeals here reasoned that the agreements could be enforced because they were not illegal "standing alone" (App. A at 24a), so respondents in *Mullins* argued that the contract there at issue was not illegal "standing alone." But this Court rejected that argument in *Mullins*:

> *"The argument is that employers' contributions to union welfare funds are not, in themselves and standing alone, illegal* acts and that ordering Kaiser to pay would therefore not demand conduct that is inherently contrary to public policy. *Kaiser, however, did not make a naked promise to pay money* to the union funds. . . . *If Kaiser's undertaking is illegal* under the antitrust or the labor laws, *it is because of the financial burden* which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. It is plain enough that *to order Kaiser to pay would command conduct that assertedly renders the promise* an *illegal* undertaking under the federal statutes.

455 U.S. at 79 (emphasis added).

By the same token, although the court of appeals in this case recognized that enforcement of the illegal tie-in

would have been improper before the tied services were rendered (App. A at 10a, 24a, & n.10), it held that the contract could be enforced now because the services have already been provided, enforcing the contract would not restrain competition in the marketplace, and only a transfer of money is at issue. But the Court in *Mullins* rejected argument, too:

> "*The contention is that since the contract has expired, enforcing the promise to contribute will not bring about any of the evils that the antitrust or labor laws are designed to prevent. But if a promise is illegal at its inception* and cannot be enforced during the term of the contract, *it does not spring to life and become enforceable when the contract expires.* If penalizing Kaiser for purchasing coal from producers without contracts with the UMW is illegal, it is not less so if the penalty is extracted after the termination of the promise. *The suit is still a suit on a presumptively illegal undertaking.* If a promisee need only wait until a contract expires to enforce an illegal provision, the defense of the legality would obviously be ephemeral. Cases such as *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), and *McMullen v. Hoffman*, 174 U.S. 639 (1899), confound such a rule."

455 U.S. at 81 n.6 (emphasis added).

The Court in *Mullins* nowhere suggested—as the court of appeals in this case concluded—that the illegality defense applies only where the judicially mandated conduct is the *means* of enforcing an illegal restraint. To the contrary, *Mullins* reaffirmed the "long established" rule that courts will not aid a wrongdoer to secure the "fruits" of illegal schemes. Pursuant to this rule, courts prior to this case have uniformly refused to permit wrongdoers to use the courts to recover ill-gotten gains. They have refused to enforce contract provisions requiring payment for services previously rendered or goods

previously supplied, penalties for past conduct or even agreements to divide the spoils of an illegal conspiracy.[9]

This heretofore unbroken rule that courts will not aid a wrongdoer to secure the fruits of its illegal scheme prohibits judicial enforcement of the contracts at issue in this case. The contracts for the sale of franchise services that respondents seek to enforce are the fruits of respondents' illegal tying arrangement. The very purpose of the unlawful tie-in arrangement was to require petitioners to purchase the franchise services (the tied product), and it is that requirement that makes the arrangement unlawful. Similarly, the lease payments are the fruits of the illegal scheme in which respondents sought to monopolize the display figures marketplace, and it is the very lease agreement which respondents seek to enforce that violates the antitrust laws.

The refusal of courts to enforce the fruits of illegal agreements takes on added significance in the context of illegal tie-in arrangements. Just last month, this Court reiterated the oft-repeated principle that tie-in arrangements are illegal in part precisely because they require buyers, like petitioners here, to "pay a higher price" for the tied product. *Jefferson Parish Hospital District No. 2*

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[9] *See* cases cited in n.13, *infra*. The only circuit court case since *Mullins* other than this one to discuss application of the illegality defense to tying arrangements is *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1060 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983). There, the court disallowed the illegality defense on the ground that the contract sought to be enforced was not the illegally tied agreement. The court explained that the buyer in that case "does *not* allege that [the seller] is requesting an *inflated price* for the [contract product at issue] *nor* does [the buyer] allege that the [contract product at issue] is *a tied item*." (emphasis added). In this case, in contrast, petitioners do allege that the franchise services are the tied product and that they are injured as a result of having to purchase that product pursuant to an illegal tying arrangement and to pay an inflated price for it.

v. Hyde, 104 S. Ct. 1551, 1557 n.15 (1984), *quoting* H.R. Rep. No. 627, 63d Cong., 2d Sess. 12-13 (1914).[10] Thus, by enforcing the illegally tied franchise agreements in this case, the Court would not only be helping the wrongdoers reap the fruits of their illegal arrangement, but also would impose the very injury—forced payment of illegal overcharges—that the antitrust laws are intended to prevent.[11]

If left to stand, the court of appeals' decision would severely undermine the illegality defense. The defense would apply only where the conduct being enforced is illegal "standing alone," and courts would be available—indeed, required—in all other cases to aid wrongdoers to reap the fruits of their illegal schemes. The decision would thus thrust the courts into a role that this Court has for decades rightly held is not proper for the federal courts.

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[10] *See also Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1284 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 447-48 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 750 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). The court of appeals in this case overlooks the significance of the economic impact of the tying arrangement on the sale of the tied product. The court states that the sale of the franchise services, the tied product, constituted "a routine exchange," implying that the terms of the sale were unaffected by the alleged antitrust violation. App. A at 23a. To the contrary, if the tying arrangement is unlawful as petitioners allege, it is at least in part because it enabled respondents to sell the franchise services—not in a "routine exchange"—but in an unlawful exchange and at a higher price than petitioners would otherwise have paid for them.

[11] Under the circumstances, petitioners should be permitted to recover overcharges paid in the past and in the future under the doctrine of recoupment. *See, e.g., Bull v. United States*, 295 U.S. 247, 262 (1935). It would be anomalous for a court both to enforce the agreement and, simultaneously, to require repayment of the overcharges.

B. The Court Of Appeals' Decision Permits Courts To Enforce Illegal Agreements By Substituting Their Concept Of Public Policy For Policies Embodied In Federal Statutes In Contravention Of This Court's Decision in *Mullins*.

The court of appeals also erred in concluding that, even if requiring payments pursuant to the franchise agreements enforces an illegal restraint, the defense of illegality should be disallowed because of the complexity of proof that entertaining the illegality defense would require and the fear that petitioners, having already received the tied product, should not be unjustly enriched by nonenforcement of the payment provisions. App. A at 24a. The court of appeals' rationale rests, in effect, on the premise that courts may enforce illegal agreements by substituting their notions of public policy for policies embodied in federal statutes.

The court of appeals in the *Mullins* case had relied on the same notions of public policy (642 F.2d 1302, 1307-08, 1311-13), and this Court reversed. In so doing, this Court rejected any balancing approach that focused on whether litigation had commenced before or after the consideration was paid under the contract (455 U.S. at 81 n.6.) or on whether the illegality of the contract was easy or difficult to ascertain. To the contrary, the Court held, "a federal court has a duty to determine whether a contract violates federal law before enforcing it." 455 U.S. at 83.[12] The Court in *Mullins* thus followed a long line of decisions in which courts have recognized that equitable doctrines such as unjust enrichment and waiver have no place in an action brought to enforce an unlawful contract.[13]

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[12] In *Mullins*, as here, the issue was whether a federal court will enforce an illegal agreement. Very different considerations would arise in an action seeking recovery in restitution or quantum meruit for the value of goods or services provided.

[13] 455 U.S. at 81 n.6. Courts have frequently refused to enforce contract clauses that were found to be illegal where the plaintiff

The reliance of the court of appeals in this case on a balancing of equitable or discretionary factors to determine the availability of the illegality defense cannot be reconciled with this Court's decision in *Mullins* or the prior cases. Moreover, the court of appeals' decision revives the uncertainty about the availability of the illegality defense which this Court sought to put to rest in *Mullins*. The Court should grant certiorari to clarify this important area of federal law.

II. THE COURT OF APPEALS' DECISION ON THE STATUTE OF LIMITATIONS ISSUE CONFLICTS WITH THE MOST RECENT DECISION OF THIS COURT AND OTHER CIRCUIT COURTS AND FAILS TO RECOGNIZE THAT PAYMENT OF AN INFLATED PURCHASE PRICE CAUSES ANTITRUST INJURY TO PURCHASERS OF UNLAWFULLY TIED PRODUCTS.

The court of appeals' holding that petitioners' antitrust challenge to the tying arrangement is barred by the statute of limitations conflicts with this Court's most recent decision on illegal tying arrangements and with

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was suing for money owed for services previously rendered or goods previously supplied. *E.g., McMullen v. Hoffman*, 174 U.S. 639 (1899); *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Kogod v. Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950); *United States v. Bayer Co.*, 135 F. Supp. 65, 72 (S.D.N.Y. 1955). And courts have reached this result even where the defendant himself benefitted from that which made the contract clause illegal. (*E.g., McMullen v. Hoffman, supra*; *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., supra*; *United States v. Bayer Co., supra*). As this Court recognized in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 565 (1961), "even if [nonenforcement of an illegal contract] . . . in a given case may seem harsh . . . that result is dictated by the public policy manifested by the statute." *See also, e.g., Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Inter-Continental Promotions, Inc. v. Miami Beach First Nat'l Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Doherty v. Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936).

decisions of several other circuit courts. This Court should grant certiorari to resolve the conflict.

The court of appeals recognized that the controlling test was that stated by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971):

> "[i]n the context of a conspiracy to violate the antitrust laws, . . . *each time a plaintiff is injured by an act of the defendants* a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."

App. A at 11a (emphasis added). But the court of appeals held that, although requiring petitioners to make continuing payments for the tied franchise services caused "pecuniary" harm to petitioners, it did not cause "antitrust injury." App. A at 11a, 17a. The court reasoned that petitioners had already received the tied services and that enforcement of the agreement now would no longer "directly affect competition in the tied product market." App. A at 11a.[14]

The court's decision draws into unusually sharp focus the inconsistency between two lines of authority in the lower courts. The first line of authority, which consists

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[14] This conclusion was based on the court of appeals' finding that the franchise contracts required respondents to provide franchise services only at the outset of the contract term, and not throughout the term of the contract. This factual finding was made for the first time on appeal. In the district court, petitioners introduced evidence that the contracts required respondents to furnish franchise services throughout the term of the agreements. This evidence included a contract requiring respondent Lynch to provide "the continuing services which respondent National [Historical Museums, Inc.] is required to render to such franchisee under the terms of the franchise agreement . . ." and a letter from respondent Dorfman to a prospective franchisee explaining that the 5 percent franchise fee is for a "continuing association over the franchise period on advertising, promotion, etc.;" the court of appeals ignored both of these documents in its opinion. The district court did not resolve the dispute, but instead pretermitted the issue on an erroneous law-of-the-case theory. App. A at 12a-13a.

of certain statute of limitations cases, concludes that a seller's receipt of unlawfully extracted payments does not constitute antitrust injury. The second line of authority, which consists of substantive cases on illegal tying arrangements culminating in this Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984), recognizes that a buyer's payment of overcharges extracted through illegal tie-ins constitutes antitrust injury.

The well-spring of the conflict appears to be found in this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In that case, Hanover, a shoe manufacturer, alleged that United, a manufacturer of shoe machinery, had monopolized the shoe machinery industry by its practice of leasing and refusing to sell its machinery. This Court affirmed the lower courts' finding of unlawful monopolization and held that antitrust injury results "[a]s long as the seller continues to charge the illegal price." 392 U.S. at 489. The Court stated that

> "when a buyer shows that the price paid by him for materials purchased for his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4 [of the Clayton Act]."

392 U.S. at 489.

United argued that Hanover's claims were time-barred because its lease-only policy commenced, and "Hanover's cause of action arose" years earlier. 392 U.S. at 502 n.15. But the Court rejected that argument, explaining that, unlike a refusal to deal or other non-contractual offense, Hanover was faced with a "continuing violation" and continuing harm. Thus, the Court concluded, "[a]lthough Hanover could have sued in 1912 . . . , it was equally entitled to sue in 1955." *Id.*

The Fifth Circuit applied the rationale of *Hanover Shoe* to a tying arrangement in *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029

(5th Cir.), *cert. denied*, 434 U.S. 859 (1977). In that case, the court held that a challenge to an illegal tying arrangement was not barred by the statute of limitations where the buyer had continued to make payments for the tied product during the limitations period. The court concluded that "an antitrust cause of action continues to accrue so long as a defendant *continues to accept benefits* under or assert the validity of an allegedly unlawful tying contract." 549 F.2d at 1039 (emphasis added).

Two other circuits, the Third and the Seventh, appear to accept the "continuing benefits" theory as stated in *Mangurian*. In *Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970), on which the court in *Mangurian* relied, the Seventh Circuit rejected defendants' statute of limitations defense on the ground that defendants had collected payments under an allegedly illegal installment contract within the limitations period. The court held that, so long as defendants were "receiving the benefit through continuing enforcement of their unlawful scheme" the statute of limitations would not commence to run. 420 F.2d at 1200 (citation omitted). Similarly, in *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3d Cir. 1978), the Third Circuit expressly adopted the "well reasoned" rationale of *Mangurian* in holding that a claim arising out of a lease that excluded plaintiff from a shopping center was not barred by the statute of limitations.

Other statute of limitations cases, however, have been uncomfortable with the "continuing benefits" theory enunciated in *Mangurian*. Indeed, other panels of the Fifth Circuit have twice rejected the argument that defendants' continued receipt of payments under an illegal contract extends the statute of limitations.[15] These panels

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[15] *Kaiser Aluminum & Chemicals Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983); *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) (allegation of a collusive bid in violation of Section 1 of the Sherman Act). The

distinguished *Mangurian* on the ground that the statute of limitations had been tolled there because the amount of damages could not be ascertained at the time the disputed contract was signed, even though the court in *Mangurian* had expressly said that issues of speculativeness as to damages were "not involved" in that case. 549 F.2d at 1034 n.14.[16]

At least one other circuit has rejected the "continuing benefits" theory. In *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982), the Ninth Circuit held that defendants' continued receipt of payments for a tied product "is not enough to restart the statute of limitations." 688 F.2d at 694.

These latter cases, then, although marred by doctrinal confusion, seem to mean that the continued payment by a buyer of illegally extracted overcharges does not constitute antitrust injury. The court of appeals' decision in this case reflects an application of this rule.[17]

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court's decision in *Avondale* is confusing. Although the court rejected the continuing benefits theory enunciated in *Mangurian*, it was also careful to point out that the payments which defendant had received were not for the unlawfully tied product. 677 F.2d at 1054.

[16] The distinction of *Mangurian* on the ground that the amount of future damages could not be ascertained does not make sense anyhow. The proper remedy there, as in any challenge to an unlawful executory contract, was to void the contract and thus prevent future injury from payments under the contract. (Moreover, in *Mangurian*, the amount of the allegedly illegal payments could be adjusted periodically by the defendants with reference to the consumer price index; the panels in the later cases concluded that this indexing precluded the plaintiff from calculating the amount of damages he would suffer. The same argument, of course, is available to petitioners in this case, where the payments owed to respondents are based on a percentage of the uncertain gross receipts over a 20-year or longer period.)

[17] In *General Aircraft Corp. v. America, Inc.*, 482 F. Supp. 3, 10 (D.D.C. 1979), the only other time the issue appears to have been considered in the District of Columbia Circuit, the court adopted the *Mangurian* reading of *Hanover Shoe*.

This rule, however, is inconsistent, not only with *Mangurian* and like cases, but also with a different line of authority—the substantive antitrust law of tie-in arrangements—culminating most recently with this Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984). In *Jefferson Parish*, this Court recognized that the antitrust prohibition on illegal tie-in arrangements was "especially" intended to protect purchasers from precisely the kind of injury—payment of an excessive price—that petitioners here allege they have incurred.[18]

The Court's recognition in *Jefferson Parish* of the antitrust injury incurred by purchasers—like petitioners here—who are required to pay excessive purchase prices pursuant to illegal tying arrangements comports with the rationale of earlier Court decisions. In *Hanover Shoe*, *supra*, the Court held that antitrust injury results "[a]s long as the seller continues to charge the illegal price." And in *Mullins* the Court concluded that the agreement was illegal under the antitrust laws, if at all, "because of the financial burden" that it imposed upon Kaiser. 455 U.S. at 79.

Consistent with this Court's rationale in *Jefferson Parish*, decisions of the Third, Sixth, Eighth, Ninth, and Eleventh Circuits recognize that purchasers under illegal

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[18] 104 S. Ct. at 1559-60 ("[F]rom the standpoint of *the consumer —whose interests the statute was especially intended to serve*—the freedom to select the best bargain [in the tied market] is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.") *See* 104 S. Ct. at 1557 n.15 (quoting from the legislative history of the Clayton Act which stated that tie-in agreements are proscribed in part because "[t]he public is *compelled to pay a higher price . . .*."); *id.* at 1558 ("the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"). (emphasis added).

tying arrangements or similar restrictions are entitled to damages for the overcharges extracted from them by such arrangements.[19] While these cases do not directly address the statute of limitations issue, they do make clear that enforcement of illegal agreements in cases like this one would cause "antitrust injury" by imposing cognizable pecuniary harm upon purchasers of illegally tied products.

These two lines of cases—the "continuous benefits" cases and the "antitrust injury" cases—are not consistent. The antitrust injury cases recognize that the antitrust prohibition against unlawful tying arrangements is intended, in part, to protect buyers from payment of overcharges and that their payment of such overcharges constitutes antitrust injury. Yet, the continuing benefits cases conclude, as did the appellate court here, that the "receipt of payments" by the seller does not constitute a continuing antitrust harm sufficient to begin the limitation period. App. A at 17a.

The "antitrust injury" cases articulate a standard that correctly implements the test set out in the *Zenith Radio* case. That case, as noted above, held that a new cause of action arises "each time a plaintiff is injured by an act of the defendants." 401 U.S. at 338. Under this test, the buyer "is injured" whenever he pays an unlawfully high price; and his injury is the result of "an act of the defendants," at least where—as here—the seller takes affirmative steps to enforce the illegal agreement.

The court of appeals erred in this case because it failed to recognize that petitioners were injured each time re-

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[19] *See, e.g., Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 447-48 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 750 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

spondents required them to pay the unlawfully high price pursuant to the illegal tying agreements. Under *Zenith*, a new cause of action arose each time the contract was enforced, and new causes of action will arise if the contract is enforced in the future. The critical flaw in this case, like the other "continuing benefits" cases, is the failure to recognize that the benefits extracted by the seller are simply the flip side of injury suffered by the buyer.

This Court should grant certiorari to resolve the conflict among the cases and to correct the failure of the recent continuing benefits cases to recognize that the antitrust laws are intended in part to protect purchasers like petitioners here from precisely the kind of injury they have suffered and will be required to continue to suffer if respondents are permitted to enforce their illegal tying arrangement without judicial scrutiny.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

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